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Supreme Court of the United States

PETITION FOR REHEARING

Supreme Court of the United States

OCTOBER TERM, 1958

No. 800

ADOLPH C. BURGER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

This petition for rehearing of the Court's order of May 18, 1959, in the instant cause is filed to present to the Court a significant issue not raised in the petition for a writ of certiorari.

Petitioner here was indicted for willfully attempting to evade corporate income taxes on monies paid "to the corporation by the purchaser over and above the amount entered on the corporation's books" (R. 12). The new issue presented is whether an individual may be convicted under such an indictment when the tax liability for the items omitted from the corporate return is doubtful and the Government has made no effort to prove that the individual believed that the items omitted constituted taxable corporate income.

Petitioner was a 50 per cent shareholder of the corporation whose tax was alleged to have been understated. The other shareholder was petitioner's wife, who had contributed one half the capital investment out of which the corporate entity was created. The items in question consisted of certain cash payments over and above the invoice price made to nonshareholder employees by purchasers of automobiles in order to obtain preferential treatment. The indictment charged that these payments were corporate income. As to the evidence, there was testimony which, if admissible, tended to show that some of this money was received from these employees by the petitioner himself. The trial court proceeded on two assumptions: that this money, if received by petitioner, served to increase the corporate net income; and that, if so received, there had been a willful attempt to evade corporate income tax. The verdict of guilty indicates that the jury believed petitioner himself received the money. It indicates no more.

By affirming a conviction for willful attempt to evade corporate income taxes despite the complete absence of evidence that petitioner knew such taxes to be owing, the court below has rendered a decision which is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Macias* v. *Commissioner*, 255 F.2d 23 (7th Cir. 1958). The *Macias* case involved a corporate officer who received from one of his company's customers side payments with respect to sales of corporate property and did not report the proceeds of such payments on his personal income tax return. The Commissioner assessed deficiencies and fraud penalties, and the Tax Court found the assessment to be correct. The Court of Appeals, although agreeing

that these payments had constituted taxable income to Macias, found that the fraud penalty could not properly be imposed. That court held that the decision in *Commissioner* v. *Wilcox*, 327 U.S. 404, provided the taxpayer with reason "to think that the payments received by him did not constitute reportable income." 255 F.2d at 28. And while there was no proof that the taxpayer had in fact relied on the *Wilcox* decision, the court held that the Government had failed to meet its burden by failing to show that he had *not* so relied. The Court of Appeals therefore held that the imposition of civil fraud penalties rested on nothing but conjecture and suspicion and could not be sustained.

Thus, where the taxpayer has a reasonable legal basis for believing that the omitted items of income are not required to be reported, the Court of Appeals for the Seventh Circuit holds that civil fraud penalties may not be sustained unless the Government affirmatively shows that the taxpayer believed he had an obligation to report such items. The court below, on the other hand, holds that a criminal conviction can be sustained with no such affirmative showing. Unless it be assumed that a criminal conviction can be sustained on less evidence than is necessary to support a civil fraud penalty, the conflict between the Seventh and Eighth Circuits cannot be resolved.

The factual situation in the instant case is in all significant respects identical to that in the *Macias* case. The petitioner denied that he received or knew of the payments in question. As in *Macias*, there was no evidence indicating that, in filing the corporation's returns, he believed that such payments were not reportable corporate income, even if received by him.

But, also as in *Macias*, the Government offered nothing to show that petitioner did believe such payments were reportable corporate income. At a bare minimum, the *Macias* case holds that a finding of fraud cannot properly be made in the absence of such evidence if the taxpayer could reasonably have believed that the items in question were not to be included in income. And it is as clear in the instant case as it was in *Macias* that the petitioner could reasonably have held such a belief.

The fact of the matter is that even today—eleven years after the second of the returns which is alleged to have been fraudulent—the decided cases with but one exception have held that money received and retained by a shareholder on the disposition of corporate property does not constitute corporate income unless all the shareholders consent to such receipt and retention.* Thus, entirely apart from the question whether the Government has proved the requisite criminal intent, the great weight of authority indicates that petitioner cannot have committed the crime for which he was indicted. But even if it be conceded that the Government was able to prove the existence of corporate income, it is perfectly clear that petitioner could reasonably have believed that such income did not exist. Only if the *Macias* case is repudiated can petitioner be held to have been proved guilty of the crime of which he was accused.

Nor does the *Macias* case stand alone. In *United States* v. *Martell*, 199 F.2d 670 (3d Cir. 1952), *cert. denied*, 345 U.S. 917, a case involving the meaning of willfulness under the statutory section here involved, the Court of Appeals for the Third Circuit held that a

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* These authorities are discussed at pp. 7-9 of the Petition for a Writ of Certiorari, pp. 8-9 of the Brief for the United States in Opposition, and pp. 2-3 of the Reply Brief for Petitioner.

conviction for a willful attempt to evade tax "requires a specific wrongful intent to conceal an obligation *known to exist*, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable. A conviction cannot be sustained unless this state of mind is *supported by the evidence and explained to the jury.*" 199 F.2d at 672. (Emphasis added.)

Moreover, in a case with facts similar but more favorable to the Government than those of the instant case, the Tax Court has held that fraud penalties could not be sustained. That case is *United Dressed Beef Co.*, 23 T.C. 879 (1955), *acq.*, 1955-2 C.B. 9. There, over-invoice cash payments by purchasers of corporate property were divided between the two shareholders in proportion to their stock holdings, while here it is alleged only that one of two equal shareholders received such payments. There, the Government's burden was to prove civil fraud merely by "convincing evidence," while here it was to prove fraud beyond a reasonable doubt. Yet in that case the court refused to find fraud in the failure to report the payments as income to the corporation because it was not "affirmatively shown by the [Government] that the responsible officers of the corporation believed the cash collections to represent income to the corporation in the fiscal years ending prior to 1945," and because with respect to later fiscal years the taxpayers' competent counsel advised "that this money was not income to the corporation." 23 T.C. at 887, 888.

To the extent that the instant case differs from *United Dressed Beef Co.*, the differences militate against the judgment below. For, in dealing with fiscal years which roughly coincide with those involved in the instant case, the Tax Court held that there was no fraud although the income was more clearly income

to the corporation than in the instant case, and although the Government's burden of proof was less exacting.

The only alternative to concluding that the instant case is in conflict with *Macias* is to conclude that the court below sustained petitioner's conviction on the ground that he must have been guilty of *something*. The prosecuting officials may have believed that petitioner had willfully violated the emergency price control law. They may have believed that he had willfully understated his personal income. They may even have believed him to be "an all round, no good dissolute person." *Bloch* v. *United States*, 221 F.2d 786, 790 (9th Cir. 1955). But having indicted for willful attempt to evade corporate income tax, their obligation was to prove that crime and no other.

The conflict between the *Macias* case and the decision below is unmistakable if the indictment defines and limits, as it must, the crime of which a defendant may be convicted. Nor does this conflict involve an unimportant question of law. Rather it concerns the right of an individual to be acquitted unless the prosecution has proved every essential element of the crime specifically charged in the indictment. This right is one of the basic civil rights guaranteed by the Constitution. As urged below and ignored by the court, the denial of this right was "such as to constitute a denial of due process of law." Indeed, if a conviction for willful attempt to evade corporate income taxes can be obtained where the Government makes no attempt to show either that the evasion was willful or that the income was corporate, any future comment on procedural due process will contain a significant footnote when tax evasion cases are discussed.

In addition to the foregoing reason for rehearing this cause, the attention of the Court is called to the petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit filed on June 3, 1959, in *Audett v. United States,* No. 975. One of the questions presented by that petition is whether this Court should overrule prior decisions and now establish for the federal courts, in accordance with a growing trend in state law, the rule that one accused of a crime cannot be convicted solely on the uncorroborated testimony of purported accomplices. The only evidence in the instant case connecting petitioner with the alleged crime consisted of such testimony. If a writ of certiorari should issue in the *Audett* case, it would be appropriate for this Court to review the instant case as well.

For the reasons stated it is respectfully suggested that the petition for rehearing should be granted.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

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